IN THE HIGH COURT OF KERALA AT ERNAKULAM

PRESENT :

THE HONOURABLE MR. JUSTICE J.M.JAMES

MONDAY, THE 12TH MARCH 2007 / 21ST PHALGUNA 1928

CRL.A.No. 1069 of 2002()

ST.408/1998 of CHIEF JUDICIAL MAGISTRATE COURT, PALAKKAD

.....

APPELLANT: COMPLAINANT:

JOJU P.D., S/O. DEVASSY,
PROPRIETOR, JAS VIDEO, THARAKKAD, PALAKKAD.

BY ADV. SRI.JIJO PAUL

RESPONDENTS: STATE & ACCUSED:

---

1. STATE OF KERALA,
REPRESENTED BY THE PUBLIC PROSECUTOR,
HIGH COURT OF KERALA, ERNAKULAM, KOCHI-31.

2. EDAPAZHANJI VELAPPAN, MANAGER,
S/O. VISWANATHAN, GOVERNMENT MODEL H.S., JUNCTION,
NEAR MALAYALA MANORAMA PRESS, THAMPANOOR,
TRIVANDRUM.

BY PUBLIC PROSECUTOR SRI.PUZHAKKARA MUHAMMED.
SRI.K.J.ABDULRASHEED

THIS CRIMINAL APPEAL HAVING BEEN FINALLY HEARD ON 12/03/2007, THE COURT ON THE SAME DAY DELIVERED THE FOLLOWING:

J.M. JAMES, J.

Criminal Appeal No. 1069 of 2002

Dated this the 12th March, 2007.

J U D G M E N T

The complainant in S.T.No.408/1998, on the file of the Chief Judicial Magistrate Court, Palakkad, is the appellant. He preferred a complaint before the court below under Section 138 of the Negotiable Instruments Act, in short 'the Act'. He examined himself as PW.1 and marked five documents. The accused examined one witness as DW.1. After appreciating the evidence, the lower court acquitted the accused holding that the accused had rebutted the presumption available under Section 139 of the Act, and, therefore, the case as put forward by the complainant has not been proved. The acquittal of the accused is under challenge through this appeal, after obtaining leave of this Court.

2. The case of the complainant is that he had paid an amount of Rupees Two Lakhs on different occasions for buying machineries and landed property for starting a printing press, and a daily, by name 'Chitradesom'. When the appellant demanded the money, he issued Ext.P1 cheque, dated 8.10.1997, for an amount of Rupees Two Lakhs. It was dishonoured. The amount was not settled

despite notice, informing the second respondent of the dishonour of the cheque and demanding of the amount. Hence, the complaint was preferred.

3. PW.1, the complainant deposed that he paid the amount on different occasions. Ext.P1 cheque was issued for the total amount of Rupees Two Lakhs. The accused did not enter the box. However, he examined DW.1 to show that a cheque for Rs.5000/= has been issued by the appellant in favour of the accused on 7.3.2001. If Ext.P1 cheque of the year 1997 was pending, another cheque may not have been issued, concludes the Magistrate. The learned Magistrate also found that the hand writings in Ext.P1 cheque are of different ink, and, therefore, the stand of the appellant in the box that the accused brought the cheque, after writing the details therein, cannot be accepted. Therefore, the learned Magistrate dismissed the appeal accepting the version of the accused.

4. Whether a cheque can be written by different ink, whether the name and other details can be filled up by the holder in due course of the cheques, and whether the presumption is available

to the drawee, came up for consideration of this Court in **Lillykutty v. Lawrance** *(2003 (3) KLT 721).* A Division Bench of this Court, analysing similar fact situation, came to the conclusion that,

> "The mere fact that the payee's name and the amount shown are not in the handwriting of the drawer does not invalidate the cheque. No law provides in the case of cheques the entire body has to be written by the drawer only. What is material is the signature of the drawer and not the body of the instrument. Therefore when the drawer has issued the cheque whether the entire body was written by the drawer written beyond the instructions of the drawer, whether amount is due or not, those and such matters are defences which drawer has to raise and prove it. Therefore the mere fact that the payee's name and the amount shown in the cheque are in different handwriting is not a reason for not honouring the cheque by the Bank. Banks would normally see whether the instrument is that of the drawer and the cheque has been signed by the drawer himself. The burden is therefore entirely on the drawer of the cheque to establish that the date, amount and the payee's name are written by somebody else without the knowledge and consent of the drawer."

5. The situation in this case with regard to Ext.P1 is also similar. The second respondent, accused, ought to have entered the box and explained by disproving the contents therein. In the cross examination of PW.1, suggestions were made to him that when he was arrested in connection with abkari offence, amounts had been paid on

different occasions. But except the suggestion, nothing had been brought out to establish the case through independent evidence, at least, as per the principle of preponderance of probabilities. The evidence of DW.1 alone is insufficient to hold that there had been transactions even after Ext.P1 cheque, and, therefore, issuance of Ext.P1 cheque is to be disbelieved. I have gone through the discussions of the learned Magistrate. He has proceeded with the view that the cheque had been written by some one else, and, therefore, the blank cheque issued by the accused has been misused by the appellant. That was the reason why the learned Magistrate came to the conclusion that the accused has succeeded in rebutting the presumption available under Section 139 of the Act. That conclusion is against the findings in Lillykutty's case, cited above. Hence, such findings is not sustainable.

6. In the above circumstances, I am of the opinion that an opportunity be given to both the parties to adduce fresh evidence, if they are so advised. To enable the same, I set aside the impugned judgment of the court below, and restore S.T.No.408/1998, on the file of the Chief Judicial Magistrate Court, Palakkad.

7. The parties shall appear before the court below on 23.4.2007.

8. The learned Magistrate shall dispose of the matter, as per the law, after giving an opportunity to both sides to adduce evidence, if they chose to do so, at the earliest, and in any case, within four months from the date of appearance of the parties, untrammeled by the observations and discussions in this judgment.

Criminal Appeal is allowed as above.

J.M. JAMES,
JUDGE

nj.

J.M. JAMES, J.

Criminal Appeal No. 1069 of 2002

J U D G M E N T

Dated: 12th March, 2007.